STATE OF MICHIGAN

COURT OF APPEALS

LENARD A. KOZMA d/b/a LENARD A. KOZMA CONSTRUCTION, Plaintiff-Appellant, v CHELSEA LUMBER COMPANY, ROBERT ASHBY, DARRELL WILLIAMS, JEFF EDER, JASON ADKINS, JASON JANESKI, and CREEKSIDE CONSTRUCTION, LLC, Defendants-Appellees.	UNPUBLISHED December 19, 2013 No. 311258 Washtenaw Circuit Court LC No. 07-000987-CZ

Before: MURPHY, C.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment after a jury trial of no cause of action in favor of defendants Chelsea Lumber Company, Robert Ashby, Darrell Williams, and Jason Adkins (the Chelsea Lumber defendants), as well as an order granting a directed verdict in favor of defendants Creekside Construction, LLC, and Jason Janeski. Defendant Jeff Eder, an employee of Chelsea Lumber, also moved for and was granted a directed verdict, but his motion was not challenged below, nor is the court's ruling on it at issue on appeal. We affirm.

Plaintiff, a licensed builder, contended that he had an exclusive contractual relationship with Chelsea Lumber to construct garages from garage kits sold by Chelsea Lumber. Plaintiff maintained that the relationship was not honored and filed suit, alleging myriad causes of action against defendants. The trial court summarily dismissed all of the claims. This Court reversed in part and remanded, finding that issues of material fact existed relating to a claim of fraudulent misrepresentation against the Chelsea Lumber defendants and a claim of tortious interference with a business relationship against Janeski and Creekside Construction, which is a construction company owned by Janeski that started building some garages for Chelsea Lumber customers. *Kozma v Chelsea Lumber Co*, unpublished opinion per curiam of the Court of Appeals, issued July 20, 2010 (Docket No. 290713). On remand, the trial court granted a directed verdict in favor of Janeski and Creekside Construction on the tortious interference claim and a directed verdict in favor of Eder on the fraudulent misrepresentation claim. The remaining claims of fraudulent misrepresentation were submitted to the jury, and the jury returned a verdict of no cause of action. Plaintiff now appeals.

We review de novo a trial court's decision on a motion for directed verdict. *Krohn v Home Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011). This Court reviews all evidence presented up to the time of the motion in the light most favorable to the nonmoving party to determine whether a question of fact existed. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 455; 750 NW2d 615 (2008). In doing so, this Court grants the nonmoving party every reasonable inference and resolves any conflict of evidence in favor of the nonmoving party. *Krohn*, 490 Mich at 155; *Elezovic v Ford Motor Co*, 472 Mich 408, 418; 697 NW2d 851 (2005). A directed verdict is appropriate only in situations where no factual question exists that would allow reasonable jurors to differ. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427-428; 711 NW2d 421 (2006). This Court reviews de novo the application of the law of the case doctrine. *Hill v City of Warren*, 276 Mich App 249, 305; 740 NW2d 706 (2007).

Plaintiff first argues that the directed verdict was impermissible pursuant to the "law of the case doctrine" because in this Court's prior opinion, the Court found that based on the evidence presented, reasonable minds could differ whether Janeski knew of plaintiff's alleged exclusive relationship with Chelsea Lumber.

The law of the case doctrine precludes a court from revisiting a determination already made by a higher court after remand, at least so long as the facts do not change in any material way during the interim. *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). Although the doctrine is not strictly a limitation on the authority of the courts, it is sufficiently important that, as a matter of practice and discretion, it is to be applied irrespective of whether the prior decision was actually correct. *Hill*, 276 Mich App at 308. The rationale behind the doctrine is to "maintain consistency and avoid reconsideration of matters once decided during the course of a single lawsuit[.]" *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 128; 737 NW2d 782 (2007).

Irrespective of this Court's determination of the significance of the evidence to Janeski's knowledge of plaintiff's alleged relationship with Chelsea Lumber, the trial court granted the directed verdict on *two independent* grounds. The trial court indicated that it was granting the motion for directed verdict because plaintiff had failed to present evidence that Janeski knew of the alleged exclusive relationship *and* because plaintiff did not present evidence that Janeski intentionally interfered with that relationship.[1] Knowledge is one of several essential elements of a tortious interference claim; intentional interference is another. *Winiemko v Valenti*, 203 Mich App 411, 416; 513 NW2d 181 (1994). Plaintiff must "establish that the interference was improper." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 383; 670 NW2d 569 (2003) (citation omitted). "The 'improper' interference can be shown by either proving (1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiffs' contractual rights or business relationship." *Id.* (citation omitted).

[1] The trial court stated that it "heard no evidence that the defendant Janeski knew of *or intended to interfere with* any alleged exclusive relationship between Chelsea Lumber and the plaintiff." (Emphasis added.)

We first note that plaintiff does not even argue that the trial court erred by directing a verdict based on a failure to create a factual question regarding intentional interference and instead focuses exclusively on the element concerning knowledge of the relationship. Obviously, and minimally, a factual dispute on all of the requisite elements had to exist in order to survive the motion for directed verdict; knowledge of the relationship was irrelevant if evidence of intentional interference was ultimately lacking. We need not even consider granting relief to an appellant if the appellant fails to address and challenge the basis of a trial court's ruling. *Joerger v Gordon Food Services, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997). The fact that plaintiff presents an argument in his appellate reply brief is unavailing, considering that a reply brief is only for rebuttal purposes and cannot be used as an avenue to raise new arguments in support of reversal. *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003). We reject plaintiff's argument that the intentional interference issue was not preserved for appeal and thus should not be considered because Janeski and Creekside, in moving for the directed verdict, only raised an issue concerning the knowledge element. This argument is entirely without merit given that the trial court, whether *sua sponte* or otherwise, actually rendered a specific ruling on the element of intentional interference; the issue needed to be addressed on appeal.[2]

Moreover, plaintiff did not present evidence that would have allowed a reasonable jury to find that Janeski, or anyone else at Creekside, intentionally interfered with the alleged exclusive relationship. This Court previously ruled that an issue of material fact existed as to the intentional interference element, stating:

> Janeski admitted that his relationship with Chelsea arose after he approached Chelsea. He further acknowledged that during the course of his relationship with Chelsea, he provided its employees with tickets to sporting events and gift certificates for restaurants. If a fact-finder concluded that the Creekside defendants were aware of the agreement with Chelsea, it could further be concluded that those defendants approached Chelsea and its employees and provided gifts in exchange for referrals that would have otherwise gone to plaintiff. [*Kozma*, slip op at 8.]

At trial, however, Janeski did not testify, nor was his deposition transcript admitted into evidence. Plaintiff did testify and assert that Janeski "paid gratuities" for referrals, with the sole basis of plaintiff's claim being Janeski's deposition testimony. We cannot conclude that this reference created a triable factual issue on intentional interference, as the reference was simply too vague and undeveloped and lacked the precision of the evidence alluded to by the prior panel. Further, plaintiff only testified to a single Detroit Tiger ticket being given to one

[2] It appears that plaintiff is arguing the preservation matter as if the trial court did not rule on the intentional interference element, with Janeski and Creekside simply raising the issue on appeal as an alternative basis to affirm the directed verdict. A review of Janeski and Creekside's brief suggests that they do not even recognize that the trial court actually ruled on the intentional interference element.

employee, which we deem inadequate to create a triable factual dispute on intentional interference. Assuming that the law of the case doctrine can even be applied in the procedural posture of this case, given that the first appeal arose out of a ruling granting summary disposition, see *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 144; 530 NW2d 510 (1995), the facts presented at trial were different than those presented at summary disposition. And therefore the doctrine did not preclude the court's ruling that granted the motion for directed verdict relative to the intentional interference element. *CAF Investment*, 410 Mich at 454. Because plaintiff failed to establish at least one of the elements of a prima facie case for intentional inference with a business relationship, the trial court's grant of a directed verdict was not in error.

Plaintiff next argues that the jury was improperly influenced by the Chelsea Lumber defendants' reference, during closing argument, to the directed verdict. We disagree. Plaintiff did not object to the reference at the time; however, our review nevertheless must consider whether any claimed misconduct denied the other party a fair trial; "[t]ainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action." *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982). Plaintiff is not obligated to essentially prove a negative, but plaintiff must establish that the attorney's conduct was sufficiently egregious to raise a substantial doubt about the resulting fairness of the trial such that this Court cannot affirmatively determine the conduct to be harmless. *Id.* at 103 n 8; *Wayne Co Rd Comm'rs v GLS LeasCo, Inc*, 394 Mich 126, 139; 229 NW2d 797 (1975). Unlike the cases that plaintiff cites, we simply cannot find that counsel's reference to the grant of directed verdict—a single, isolated comment—was sufficiently egregious to raise any substantial doubt about the fairness of the proceedings. Reversal is unwarranted.

Plaintiff next asserts that the trial court erred by precluding him from playing a tape recording between himself and a witness. Assuming any kind of error, reversal is not necessary because the presumed error was harmless. MCR 2.613(A). The purpose of making known the information on the tape was to show that there was an exclusive relationship between plaintiff and Chelsea Lumber. However, there was already ample evidence showing that an exclusive relationship existed and, moreover, the failure of the fraudulent misrepresentation claim ultimately cannot be tied to the exclusive relationship issue.

Plaintiff next argues that the trial court erred when it *sua sponte* terminated plaintiff's re-cross examination of a witness. We review a trial court's determination of the scope of cross-examination under MRE 611 for an abuse of discretion. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 454; 540 NW2d 696 (1995). It has long been held that "after a witness has been examined, he may be subjected to further interrogation by the party by whom he is called; but the extent of such re-examination rests largely within the discretion of the trial court." *Loud v Solomon*, 188 Mich 7, 12; 154 NW 73 (1915). In *Loud*, our Supreme Court was "not impressed that there was an abuse of discretion on the part of the trial judge in refusing counsel the privilege of further redirect examination" after having already permitted redirect and re-cross. *Id*. at 11-12. A plain reading of MRE 611 shows that re-cross is likewise a privilege that may be dispensed of at the trial court's discretion, not a right. Here, the trial court was clearly attempting to avoid wasting time, particularly given that the witness had already answered a

question "five times," and plaintiff's attorney had already exceeded the scope of what he had promised to be the limit of re-cross examination. We find no abuse of discretion.

Plaintiff's final argument on appeal is that the trial court's conduct directed toward plaintiff prejudiced him and may have improperly influenced the jury, denying him a fair trial. The test to determine whether judicial remarks constitute prejudicial error is whether the remarks denied a party a fair trial. *Patrick v Carrier-Stevens Co*, 358 Mich 94, 97; 99 NW2d 518 (1959). "In determining whether remarks made by a trial judge during the course of the trial were improper and prejudicial, the context in which the remarks were made must be considered. This Court will not reverse a jury verdict on account of comments made by a judge during the course of trial where it is apparent from the record that the verdict rendered was that of the jury and not the expressed opinion of the trial judge." *Keefer v C R Bard, Inc*, 110 Mich App 563, 577; 313 NW2d 151 (1981) (citations omitted). On review of the record, we conclude that plaintiff was not denied a fair trial by the court's conduct and that the verdict rendered was solely that of the jurors.

Affirmed. Having fully prevailed on appeal, defendants are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello